

## **International Commercial Litigation and Arbitration Research Essay**



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### **INTRODUCTION**

Arbitration is an alternative dispute resolution method (ADR) and has now become one of the preferred mechanisms chosen by parties to settle disputes of a commercial nature. There is no proper definition of arbitration and unlike court proceedings; it is a voluntary agreement agreed to by the disputing parties and the decision also known as the arbitral award is binding upon them. Arbitration is *quasi-judicial* in nature and an arbitrator often referred to as a private judge is a person who adjudicates on disputes submitted to him or her by the parties.<sup>1</sup>According to Sir John Donaldson, 'arbitrators and judges are partners in business of dispensing justice, the judges in the public sector and the arbitrators in the private sector.'<sup>2</sup>

Nowadays, arbitration is an emerging trend and the popularity of such a system can be attributed to many advantages it offers compared to litigation. The main fundamental features of arbitration among many others are flexibility, confidentiality, impartiality, neutrality and party autonomy.

Unlike judges, arbitrators do not necessarily have a legal background; they are mainly involved in the market they serve. For example, a former judge won't have the necessary expertise to deal with a specific dispute related to construction. So the analogy between a judge and an arbitrator in that case should not be taken too far.

By contrast, one of the biggest drawbacks of arbitration would be; unlike court judgments where parties can appeal against a decision, arbitral awards are final and binding in nature, and can be challenged only when they concern issues of procedural fairness, jurisdiction and public policy.

As mentioned above, a judge is a servant of the state having responsibilities closely linked with public policy and sovereignty that go far beyond those of an arbitrator, whose responsibilities are determined by private entities like arbitral institutions or the appointing parties themselves.<sup>3</sup>It is to be noted that the powers of the arbitrator go hand in hand with their duties.<sup>4</sup>The agreement made by the parties would constitute the primary source of the arbitrators' duties, while others duties would be imposed by arbitration rules, by law and finally there are ethical duties that would bind the arbitrators.

Mutual agreement between the parties and the arbitrators is at the base of every arbitration agreement. Certain duties are imposed on the arbitrators by the parties via the agreement to arbitrate, and once the arbitrators give their consent, they are bound by those duties. Sometimes, if we are in an institutional arbitration, for instance, in the International Chamber of Commerce arbitration, the ICC Rules of Arbitration will apply.

The adoption of the UNICITRAL Model Law by many countries provides a more unified solution to resolve international disputes. Article 18 of the Model Law is clearly an example of duty imposed by law on arbitrators. It imposes the duty on the arbitral tribunal to treat the parties equally and give them the opportunity to present their case.

After having looked at the duties imposed on the arbitrators by the parties, the rules of arbitration and the law we shall now look at what are the ethical duties of arbitrators? There would no standard and direct answer to this question. It could be considered as a very sensitive topic as ethics vary in different countries and are often influenced by tradition, culture and social beliefs. There is no international law concerning regarding arbitrators ethics, however the International Bar Association (IBA) established the Rules of Ethics for International Arbitrators in 1987, complemented by the Guidelines on Conflicts of Interests in International Arbitration 2004.<sup>5</sup>

<sup>1</sup> Danisha Sornum, *Getting Into International Arbitration* (EOI, Mauritius) 2

<sup>2</sup> Ronald Bernstein and others, *Bernstein's Handbook Of Arbitration And Dispute Resolution Practice* (1st edn, Sweet & Maxwell 2003)

<sup>3</sup> Bruno Manzanares Bastida, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' [2007] 6 (1) REM <<http://revistas.uexternado.edu.co/index.php/emerca/article/download/2070/1855>> accessed 24 April 2017

<sup>4</sup> Danisha Sornum, *Getting Into International Arbitration* (EOI, Mauritius) 116

<sup>5</sup> Danisha Sornum, *Getting Into International Arbitration* (EOI, Mauritius) 118

## International Commercial Litigation and Arbitration Research Essay

It is important to note that the Rules of Ethics for International Arbitrators together with many institutional rules on ethics are mere guidelines and they cannot be used as grounds in courts to set aside arbitral awards. These guidelines if incorporated in the arbitral agreement will bind only the arbitrators and the parties to the agreement. These rules are not intended to create opportunities for aggrieved parties to sue International arbitrators in local courts. If an arbitrator has breached an ethical duty, he or she will be removed from office and will not be remunerated.

Despite the range of sources we have come across and the variations in their application, there is surprisingly a broad agreement about the general nature of obligations to which arbitrators are subject, at least at the most abstract levels. The principal obligation of arbitrators is to be, and to behave in a manner that is, impartial, neutral and independent.<sup>6</sup> It has been argued that every action at law has a moral dimension and therefore questions of fairness, impartiality and independence are very important.<sup>7</sup> In addition, it has also been said that “if a judgement is unfair then the community has inflicted a moral injury on one of its members”<sup>8</sup> Evidence has shown that business users prefer an equitable process and a fair arbitration result even if it involves a higher cost and takes more time.

Although major institutional arbitration rules and laws set up the requirements that arbitrators should be neutral, impartial and independent, neither of them set the definite standards for three notions. Consequently the interpretation of those notions and what constitutes an infringement of the fundamental principles of fair proceeding belongs to scholars, arbitral institutions and national courts.<sup>9</sup>

Arbitrator neutrality, independence, and impartiality go to the core of the arbitrator’s function, known as a noble task, and are thus seriously considered. Failure to follow these preconditions may result in the termination or removal of an arbitrator for misconduct and breach of trust.<sup>10</sup> The main purpose of the essay is to analyse those three notions and more emphasis will be laid on the concept of neutrality and impartiality and the connection between them.

### THE CONCEPT AND LEGISLATION OF NEUTRALITY AND IMPARTIALITY.

#### The Definition and Relation of Neutrality and Impartiality.

As mentioned earlier, there is much uncertainty regarding the use of those different terminologies and this has generated extensive academic discussion and debate. The following paragraphs will elaborate more on the concept and legislation regarding neutrality and impartiality.

#### Impartiality

The term “impartial” usually describes an arbitrator’s state of mind. To be impartial, an arbitrator should not be biased towards any of the parties or their counsel. As it may be difficult from the facts to conclude whether an arbitrator is impartial, it is often considered a demonstration of impartiality to be independent.<sup>11</sup> Impartiality prohibits an arbitrator for any preference or preconceived notions about the issue.<sup>12</sup>

The test applicable to impartiality is subjective as it mainly concerns the actual state of mind and where applicable, resulting from the conduct of an arbitrator. However, it is objective in the need to determine by some external measure whether a reasonable person would consider that state of mind as constituting partiality.<sup>13</sup>

The IBA Rules of Ethics for International Arbitrators follows the same approach that impartiality is referred to as one of the elements of bias. Provision 3 of the rules states that: “Partiality arises when arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.”<sup>14</sup>

Independence and impartiality are often seen as two concepts overlapping each other, and are rarely used separately. According to Alan Redfern and Martin Hunter the two notions are “usually joined together as a term of art” and are also viewed as “the opposite side[s] of the same coin.”<sup>15</sup>

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<sup>6</sup> Catherine A. Rogers, 'The Ethics of International Arbitrators' [n.d.] () IDC

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<sup>7</sup> Bruno Manzanera Bastida, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' [2007] 6 (1) REM

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<sup>8</sup> R Dworkin, *Law's Empire* (Hart Publishing, Oxford)

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<sup>10</sup> Silvano Domenico Orsi, 'Ethics in International Arbitration: New Considerations for Arbitrators and Counsel' [2013] 3 (1) AB

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<sup>11</sup> Helena Jung, 'The standard of Independence and Impartiality for arbitrators in International Arbitration' [2008] () FLUU

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<sup>12</sup> Margaret L. Moses, *The principles and practice of international commercial arbitration* (Cambridge University Press, Cambridge) 130

<sup>13</sup> Leon Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered' [2007] () UNSW <http://law.bepress.com/unswwps-flrps/art25> accessed 26 April 2017

<sup>14</sup> International Bar Association Rules of Ethics for International Arbitrators, general standard 3

<sup>15</sup> Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> edn, London: Sweet & Maxwell, 2004), 201

### Neutrality

In Arbitration, the notion of arbitration looks literally the same as impartiality and it is quite difficult to make a clear distinction between the two. In Professor Giorgio Bernini's opinion, the two concepts are "intrinsically different" and according to the latter neutrality implies "*the likelihood that the arbitrator is, and will remain, wholly equidistant in thought and action throughout the arbitral proceedings.*"<sup>16</sup> From Redfern and Hunter's point of view, "neutrality is a mere predisposition either personally to the party or to the position taken by it in the dispute."<sup>17</sup>

In International Arbitration, it is often believed that neutrality of the arbitrator is often related to nationality. Professor M. Scott Dehaney stated that the arbitrator "might be inclined toward the position of a party who shares with him the same language, culture, and general value system."<sup>18</sup>

Susan Franck in a clear and short way expressed the following:

*"While parties may pick arbitrators with particular cultural and legal backgrounds and specific personal experiences, arbitrators also generally have an obligation to disclose those matters that would call into question their independence. Although all humans are inevitably influenced by the various experiences in their lives, in international arbitration, parties ask arbitrators to put aside biases – and fairly and impartially exercise their independent judgment to apply their expertise to the facts on the record and render a decision based upon the law."*<sup>19</sup>

From the above definitions, there are common trends but no single utopian definition of neutrality with each definition providing the requirement of further objective clarity. With the general absence of a definition of neutrality, the application of an undefined concept is therefore obscured. It is furthered that there can be no definition of such a broad concept due to the basis of application.<sup>20</sup>

### THE CURRENT LEGISLATION ON IMPARTIALITY, NEUTRALITY AND INDEPENDENCE.

#### The Requirements for both Impartiality and Independence.

As mentioned earlier impartiality and independence work hand and hand and play a very important role in ensuring a fair arbitral proceeding and a just award. Many countries and arbitral institutions have adopted this approach and the most influential one would be the UNCITRAL Model Law. Article 12(1) and 12(2) of the Model Law stipulates that:

(1) "*When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.*"<sup>21</sup>

(2) "*An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*"<sup>22</sup>

#### The Requirements for Impartiality.

The notion of Impartiality is well presented in both England and the United States. The English Arbitration Act 1996 sets a good example of the importance of impartiality. According to Section 24 (1) (a) of the Act the court has the power to remove an arbitrator when "circumstances exist that give rise to justifiable doubts as to his impartiality"<sup>23</sup>

#### The Requirements for Neutrality.

Many arbitral rules have applied the standard of the neutral arbitrator. However most of the rules name the nationality of the arbitrators rather than the neutrality.<sup>24</sup> In theory, there are many other more important factors like experience, qualification and the integrity of the arbitrator that should have been taken into consideration when appointing an arbitrator rather than the nationality of the arbitrator. In fact Article 11(1) of the Model Law states that:

*"No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."*<sup>25</sup>

<sup>16</sup> Giorgio Bernini, 'Cultural Neutrality : A prerequisite to Arbitral Justice', *Michigan Journal of International Law*, (1989) 10, 39

<sup>17</sup> Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> edn, London: Sweet & Maxwell, 2004), 4-58

<sup>18</sup> M. Scott Dohaney, 'The Neutrality and Independence of Arbitrators' [1992] 9 (4) *Journal of International Arbitration* <> accessed 26 April 2017

<sup>19</sup> Susan D. Franck, 'The Role of International Arbitrators' [2006] () ILSA <<http://ssrn.com/abstract=885381>> accessed 26 April 2017

<sup>20</sup> S McCorkle, 'The murky world of mediation ethics: Neutrality, impartiality, and conflict of interest in state codes of conduct' [2005] CFQ 1, 23

<sup>21</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, s 12(1)

<sup>22</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, s 12(2)

<sup>23</sup> Arbitration Act 1996, s 24(1)(a)

<sup>24</sup> Amina Rustamova, 'Neutrality of Arbitrators' [2009] () CEU <[www.etd.ceu.hu/2009/rustamova\\_amina.pdf](http://www.etd.ceu.hu/2009/rustamova_amina.pdf)> accessed 25 April 2017

<sup>25</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, s 11(1)

## International Commercial Litigation and Arbitration Research Essay

It is preferable but not mandatory that the nationality of the arbitrator differs from that of the parties. This applies mainly to sole or presiding arbitrators, therefore it is a compulsory rule to appoint on the post of a sole or third arbitrator someone of a different nationality.<sup>26</sup> But again this does not guarantee that an arbitrator from a neutral country would be impartial and independent in this approach.

### CORRELATION BETWEEN NEUTRALITY, IMPARTIALITY AND INDEPENDENCE.

There are several approaches regarding those three notions and many would consider them as synonyms, although some similarities does exist, from my point of view they should be identified as separate from each other. Impartiality and neutrality are mainly abstract categories which identify the mental attitude of the arbitrator towards one of the parties and there exist a high risk of bias.<sup>27</sup> The level of bias distinguishes neutrality from impartiality. This could be explained as follows: neutrality addresses the mere sympathy towards one of the parties or to the case presented to him and by contrast partial attitude differs by the existence of an apparent or enormous prejudice.<sup>28</sup> Independence on the other hand refers more to factual state of things. It concerns mainly the personal, business or social relationship with the party.

The main similarity regarding all the three notions is that all of them require the test of appearance bias, rather its actual existence. If arbitrators pass the test they might still conduct fair arbitral proceedings and render justifiable award despite having a close relationship with either party or the same cultural background.<sup>29</sup>

### SAFEGUARDS AGAINST BIAS OF ARBITRATORS.

The bias rule governs the attitude or state of mind of the decision maker. In order to ensure that a fair arbitral proceeding takes place and make sure that the notions of neutrality, impartiality and independence are adhered to, the following safeguards mentioned below are important. For the purpose of this essay emphasis will be laid only on the main ones.

#### The Disclosure Requirement.

The duty of disclosure is considered as part and parcel to the duty of obligation. Generally speaking, the disclosure is an ongoing requirement for the arbitrator throughout all the arbitral process, if any new circumstances arise that may influence his impartiality or independence, he should disclose them.<sup>30</sup> Although all ethical codes, national laws or even arbitration rules impose an obligation on arbitrators to disclose before being appointed, none has not been standardised in the codes and rules of international arbitral institutions, perhaps with the objective of differentiating one from another, and thus the requirements are more specific in some institutions than others.<sup>31</sup>

The UNCITRAL Arbitral Rules states the following:

*“A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.”*<sup>32</sup>

Similarly, the American Arbitration Association’s (AAA) Arbitration Rules establishes:

*“Arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. If, at any stage during the arbitration, new circumstances arise that may give rise to such doubts, an arbitrator shall promptly disclose such circumstances to the parties and to the administrator. Upon receipt of such information from an arbitrator or a party, the administrator shall communicate it to the other parties and to the tribunal.”*<sup>33</sup>

#### Challenging Arbitrators.

The opportunity to challenge an arbitrator or even to dispute the validity of an arbitral award does ensure a fair arbitral proceeding and also shows that the rights of the parties have been respected.<sup>34</sup> The parties may raise a challenge to an arbitrator if they suspect that the latter has not acted in an independent and impartial manner. In fact, Article 12(2) of the Model Law states that:

*“An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”*<sup>35</sup>

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<sup>26</sup> Amina Rustamova, 'Neutrality of Arbitrators' [2009] () CEU <[www.etd.ceu.hu/2009/rustamova\\_amina.pdf](http://www.etd.ceu.hu/2009/rustamova_amina.pdf)> accessed 25 April 2017

<sup>27</sup> ibid

<sup>28</sup> ibid

<sup>29</sup> ibid

<sup>30</sup> Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> edn, London: Sweet & Maxwell, 2004)

<sup>31</sup> J.L Horvath Gunther, 'The Selection of Arbitrators' [1998] CILS

<sup>32</sup> UNCITRAL Arbitral Rules, Art 9

<sup>33</sup> AAA International Arbitration Rules 1997, Art 7

<sup>34</sup> Susan D. Franck, 'The Role of International Arbitrators' [2006] () ILSA <<http://ssrn.com/abstract=885381>> accessed 28 April 2017

<sup>35</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, s 12(2)

## International Commercial Litigation and Arbitration Research Essay

Even though many arbitration laws clearly provide the circumstances under which an arbitrator should be disqualified, under international commercial arbitration, there are still no standards evidencing the bias and prejudiced attitude of the arbitrator towards one of the parties.<sup>36</sup>The lack of such important provisions leads to a case to case analysis.

### CONCLUSION

In the International business community nowadays, more and more business users are choosing international commercial arbitration as a preferred mechanism to resolve disputes as compared to national courts, it is more suitable. The main reason behind this is that arbitration is regarded as neutral, confidential, fast and less expensive way of dispute resolution. The trust of the parties in international arbitration is also based in part, and only in part, on their expectations that the arbitrators composing the tribunal are entirely independent and impartial.<sup>37</sup>Thus in order to protect the integrity of the process, the duty of disclosure of prospective members or the challenge of arbitrators is very important.

Neutrality, Impartiality and Independence of arbitrators is also viewed as key elements to a fair and reliable proceeding. As discussed above, most arbitral rules require arbitrators to be neutral, impartial and independent, but unfortunately there is not a definite explanation of those three elements and they are often treated indiscriminately by scholars, practitioners and students. Moreover, different arbitration rules use distinct wording in order to address on and the same standards.<sup>38</sup>

After having analysed all relevant materials, we can conclude that in spite of the diversity of approaches, the common standards regarding neutrality, impartiality and independence have been established. Also, it has been proved that the three notions are autonomous and they cover different circumstances. However, all the three elements require one test in order to evaluate and establish the attitude and behavior of the arbitrators.

Neutrality usually refers to the nationality and cultural background which defines the personality of the arbitrator whereas impartiality addresses mainly the mental attitude of the arbitrator towards one of the parties.<sup>39</sup>Apparent and substantial bias distinguishes impartiality from neutrality and finally, independence should be examined through the analysis of the factual circumstances of the cases. An independent arbitrator should not have any business, financial and personal relationships with the arbitrator. However, all those three notions should be analysed from the point of view of a neutral and reasonable third party.

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